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10 ZOOMIN.TV

11 **UNITED STATES DISTRICT COURT**  
12 **CENTRAL DISTRICT OF CALIFORNIA**

13 JUKIN MEDIA, INC., a California  
14 corporation,

15 Plaintiff,

16 v.

17 ZOOMIN.TV, a Dutch company,

18 Defendant.

CASE NO.:15-CV-7158-GW-FFM

**DEFENDANT ZOOMIN.TV'S NOTICE  
OF MOTION AND MOTION TO  
DISMISS COMPLAINT PURSUANT  
TO FED. R. CIV. P. 12(b)(2), 12(b)(5)  
and 12(b)(6); MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
SUPPORT THEREOF**

Hearing

20 Date: December 14, 2015

21 Time: 8:30 a.m.

22 Location: Courtroom 10

23 *[Notice of Motion and Motion to Dismiss*  
24 *Pursuant to Fed. R. Civ. Proc. 12(b)(2),*  
25 *12(b)(5) and 12(b)(6); Declarations of Jan*  
26 *Riemens, Matt Slen and Jennifer Ro filed*  
27 *concurrently herewith]*  
28

1 TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that at 8:30 a.m. on December 14, 2015 in  
 3 Courtroom 10 of the above-entitled court located at 312 North Spring Street, Los  
 4 Angeles, California 90012, Defendant Zoomin.TV (“Defendant”) will and hereby  
 5 does move for an order dismissing Plaintiff Jukin Media, Inc.’s (“Plaintiff”)   
 6 Complaint for copyright infringement and unfair competition against Defendant.

7 This motion is made pursuant to Federal Rule of Civil Procedure 12(b)(2) on  
 8 the ground that the Court lacks personal jurisdiction over Plaintiff. This motion is  
 9 also made pursuant to Federal Rule of Civil Procedure 12(b)(5) to quash service on  
 10 Defendant, as Plaintiff did not properly serve Defendant. This motion is also made  
 11 pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim.

12 This motion is made following the conference of counsel pursuant to L.R. 7-  
 13 3, which took place on November 10, 2015.

14 This motion shall be based on this Notice of Motion and Motion, the  
 15 accompanying Memorandum of Points and Authorities, the Court’s file, and any  
 16 other oral and/or documentary evidence considered at or before the hearing on this  
 17 motion.

18  
 19 DATED: November 16, 2015

JOHNSON & JOHNSON LLP

20 By /s/ Neville L. Johnson  
 21 Neville L. Johnson  
 22 Douglas L. Johnson  
 23 James T. Ryan  
 24 Jennifer Y. Ro  
 25 Attorneys for Defendant,  
 26 Zoomin.TV  
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## **MEMORANDUM OF POINTS AND AUTHORITIES**

### **I. INTRODUCTION**

Plaintiff Jukin Media, Inc. (“Plaintiff” or “Jukin”) is attempting to sue Zoomin.TV (“Defendant” or “Zoomin.TV”), a Dutch company, over the use of short form video content on Zoomin.TV’s website.

This Court lacks jurisdiction over Zoomin.TV because among other reasons, it does not conduct business in the United States, does not have an office anywhere in the United States and is not registered to do business anywhere in the United States. Zoomin.TV has no U.S. based business operations and no U.S. employees. Zoomin.TV also does not sell products or provide any services in the United States. In addition, the website that Zoomin.TV operates is not an interactive website and is not directed to anyone in the United States. Pursuant to Federal Rule of Civil Procedure 12(b)(2), this case should be dismissed in its entirety with prejudice or want of jurisdiction.

Zoomin.TV further moves to dismiss, pursuant to Federal Rule of Civil Procedure 12(b)(5), on the grounds that service of process has not been properly effected on Zoomin.TV because Jukin did not serve an officer, a managing or general agent, or to any other agent authorized by appointment or by the law to receive service of process. Furthermore, Jukin did not comply with the Hague Convention, to which the Netherlands is a party, or any other standard for international service.

Even if the Court does not dismiss Jukin’s complaint on these grounds, the Court should dismiss Jukin’s state-law unfair competition claim because it is preempted by U.S. Copyright law, pursuant to Federal Rule of Civil Procedure 12(b)(6).

### **II. FACTUAL BACKGROUND**

Zoomin.TV is a Dutch company with its principal place of business in the

1 Netherlands. (Decl. of Jan Riemens (“Riemens Decl. ¶ 2)). Zoomin.TV is a digital  
2 media company that (i) produces video content, (ii) provides advertising solutions,  
3 and (iii) exploits a Multi-Channel Network (“MCN”) on third-party platforms.  
4 (Riemens Decl. ¶ 2). Zoomin.TV offers its video content to publishers from  
5 around the world by partnering with companies such as Yahoo, Daily Motion and  
6 AOL, in order to assist in areas such as product, programming, funding, cross-  
7 promotion, partner management, digital rights management, monetization/sales, and  
8 or audience development in exchange for a percentage of the ad revenue from its  
9 channel. (Riemens Decl. ¶ 2). Zoomin.TV Netherlands, a subsidiary of  
10 Zoomin.TV, produces all of its online short form video content in collaboration  
11 with content providers from around the world. (Riemens Decl. ¶ 2). With over  
12 100 editors in Amsterdam who guide over 1500 video reporters, Zoomin.TV  
13 creates mostly original video content and live broadcasts. (Riemens Decl. ¶ 2).  
14 This content is created in a variety of video and TV formats contributing to a daily  
15 video feed of around 400 videos, in 19 different languages. (Riemens Decl. ¶ 2).  
16 Zoomin.TV’s library of short form video content currently consists of over 400,000  
17 videos to which 100,000 new videos are added per year. (Riemens Decl. ¶ 2).

18 All of Zoomin.TV’s online media productions take place in Europe, and  
19 mostly in the Netherlands. (Riemens Decl. ¶ 3). Zoomin.TV does not engage in  
20 business activities in the U.S. (Riemens Decl. ¶ 6). It is not registered to do  
21 business in California, or in any other state in the U.S. (Riemens Decl. ¶ 6).  
22 Zoomin.TV does not direct any advertising specifically toward U.S. residents.  
23 (Riemens Decl. ¶ 7). It does not advertise in any publications that are directed  
24 primarily toward U.S. residents. (Riemens Decl. ¶ 7). None of Zoomin.TV’s  
25 officers or directors reside in or are domiciled in the U.S. (Riemens Decl. ¶ 8).

26 Zoomin.TV has no U.S.-based business operations, no U.S. employees, owns  
27 no U.S. property, and leases no U.S. property. (Riemens Decl. ¶ 6). Zoomin.TV  
28



also does not sell products or provide any services in California or elsewhere in the United States. (Riemens Decl. ¶ 6).

### **III. THE COURT LACKS PERSONAL JURISDICTION OVER DEFENDANT**

Dismissal under Federal Rule of Civil Procedure 12(b)(2) is proper where the court lacks personal jurisdiction over a nonresident defendant. Because California's "long arm" statute (Cal. Civ. Proc. Code § 410.10) "is coextensive with federal due process requirements, the jurisdictional analysis under state law and federal due process are the same." *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004). A court may exercise jurisdiction only over a defendant who has "minimum contacts" with the forum state, such that the suit "does not offend traditional notions of fair play and substantial justice." *Asahi Metla Indus. Co. v. Super. Ct.*, 480 U.S. 102, 109 (1987).

"It is the plaintiff's burden to establish the court's personal jurisdiction over a defendant." *Doe v. Unocal Corp.*, 248 F.3d 915, 922 (9th Cir. 2001). To meet this burden, the plaintiff must make a prima facie showing that either (a) the defendant has "substantial, continuous and systematic" contacts with the forum sufficient to give rise to the cause of action before the court "as to subject the defendant to specific personal jurisdiction." *Scott v. Breeland*, 792 F.2d 925, 927 (9th Cir. 1986).

With respect to personal jurisdiction, Jukin alleges that "Zoomin is doing business in the state of California, and the acts of infringement complained of in this Complaint took place in the state of California, were intended to cause harm within the state of California, and did cause harm within the state of California." Compl. ¶ 9.

#### **A. Defendant Is Not Subject to General Jurisdiction**

General jurisdiction exists only where the defendant's contacts with

1 California are “substantial . . . continuous and systematic.” *Perkins v. Benguet*  
2 *Consolidated Mining Co.*, 342 U.S. 437, 446 (1952). “The level of contact with the  
3 forum state necessary to establish general jurisdiction is quite high.” *Shute v.*  
4 *Carnival Cruise Lines*, 897 F.2d 377, 380 (9th Cir. 1990), *rev’d on other grounds*,  
5 499 U.S. 585 (1991); *see also Helicopteros Nacionales de Colombia, S.A. v. Hall*,  
6 466 U.S. 408, 418 (1984); *Omeluk v. Langsten Slip & Batbyggeri A/S*, 52 F.3d 267,  
7 270 (9th Cir. 1995) (foreign corporations’ lack of a place of business in the forum  
8 “is significant, and is not overcome by a few visits”). Factors to consider in  
9 determining whether contacts with the forum are substantial, continuous and  
10 systematic include the place of business, license to conduct business, maintenance  
11 of an office, presence of employees, use of bank accounts, and marketing or selling  
12 of products in the forum state. *See Helicopteros Nacionales*, 466 U.S. at 415-418;  
13 *Shute*, 897 F.2d at 381.

14 Zoomin.TV is a foreign and nonresident entity that does not have  
15 “substantial, continuous and systematic” contacts with California and the United  
16 States. Zoomin.TV is a Dutch company with its principal place of business in the  
17 Netherlands. (Riemens Decl. ¶ 2). Zoomin.TV is not registered or licensed to do  
18 business, and does not do business, in California or in the United States. (Riemens  
19 Decl. ¶ 6). Zoomin.TV does not solicit business in California, and does not market  
20 or advertise services to residents of California. (Riemens Decl. ¶ 7). Zoomin.TV  
21 does not lease or own any real property anywhere in the United States. (Riemens  
22 Decl. ¶ 6). Zoomin.TV does not have any employees in the United States.  
23 (Riemens Decl. ¶ 6).

24 Zoomin.TV’s contacts with the United States are limited to supporting its  
25 MCN services which consist of making partnership deals with European  
26 subsidiaries and affiliates of U.S. based companies, such as AOL, YouTube and  
27 Yahoo. (Riemens Decl. ¶¶ 14, 17). Zoomin.TV offers these companies the use of  
28

1 short form videos from its web gallery. (Riemens Decl. ¶¶ 14, 17). All contracts  
 2 with any of these European affiliates and contacts are European contracts, subject to  
 3 the laws of the European countries that these companies target. (Riemens Decl. ¶¶  
 4 14, 17). Zoomin.TV has no control over these companies' uses of the videos  
 5 obtained from Zoomin.TV subject to the European partnership deals. (Riemens  
 6 Decl. ¶¶ 14, 17). Zoomin.TV's partnerships with any U.S. based company is not  
 7 for the purpose of targeting any market or user in the U.S. (Riemens Decl. ¶¶ 14,  
 8 17). Zoomin.TV does not "post" or publish videos on any website other than its  
 9 own Zoomin.TV website based in the Netherlands, located at (<http://zoomin.tv/>),  
 10 which is not an active consumer website. (Riemens Decl. ¶ 9). Zoomin.TV's  
 11 website is not direct to any California residents or U.S. residents in general. It is  
 12 directed to European residents. (Riemens Decl. ¶ 4).

#### 13 **B. Defendant is Not Subject to Specific Jurisdiction**

14 In analyzing whether specific jurisdiction exists over a nonresident  
 15 defendant, the Ninth Circuit applies a three part test:

- 16 (1) The nonresident defendant must do some act or  
 17 consummate some transaction within the forum or  
 18 perform some act by which it purposefully avails itself of  
 19 the privilege of conducting activities in the forum,  
 thereby invoking the benefits and protections of its laws.
- 20 (2) The claim must be one which arises out of or  
 results from the defendant's forum-related activities.
- 21 (3) Exercise of jurisdiction must be reasonable.

22 *Doe*, 248 F.3d at 923; *Schwarzenegger*, 374 F.3d at 802. The plaintiff bears the  
 23 burden of satisfying the first two prongs of this test. *Id.* If the plaintiff satisfies this  
 24 burden, the burden shifts to the defendant to make a "compelling case" that the  
 25 third prong—the exercise of jurisdiction is reasonable—is not met. *Burger King*  
 26 *Corp.*, 471 U.S. 462, 476–78 (1985). "If any of the three requirements is not  
 27 satisfied, jurisdiction in the forum would deprive the defendant of due process of  
 28 law." *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1155 (9th Cir.2006) (internal

1 citations and quotations omitted). In addition, “[g]reat care and reserve should be  
 2 exercised when extending our notions of personal jurisdiction into the international  
 3 field.” *Core–Vent Corp. v. Nobel Indus. AB*, 11 F.3d 1482, 1489 (9th Cir.1993)  
 4 (internal citations and quotation marks omitted). “Litigation against an alien  
 5 defendant creates a higher jurisdictional barrier than litigation against a citizen from  
 6 a sister state because important sovereignty concerns exist.” *Id.* (internal citations  
 7 and quotations omitted).

8 1. Plaintiff Cannot Make its Showing under the First Prong

9 The Ninth Circuit has set forth a detailed test for analyzing the first prong of  
 10 the specific jurisdiction standard that it has termed the “effects” test. This test,  
 11 which is based on the Supreme Court’s decision in *Calder v. Jones*, 465 U.S. 783  
 12 (1984) is applied in copyright cases. *See, e.g., Schwarzenegger*, 374 F.3d at 802.  
 13 To meet this test, a plaintiff must prove that the defendant “(1) committed an  
 14 intentional act, (2) expressly aimed at the forum state, (3) causing harm that the  
 15 defendant knows is likely to be suffered in the forum state.” *Brayton Purcell LLP*  
 16 *v. Recordon & Recordon*, 606 F.3d 1124, 1128 (9th Cir. 2010) (quoting *Yahoo! Inc.*  
 17 *v. La Ligue Contra Le Racisme Et L’Antisemitisme*, 433 F.3d 1199 (9th Cir. 2006).  
 18 Jukin cannot meet these elements here.

19 First, it cannot show that any of the actions cited in the complaint as  
 20 infringement were the intentional acts of Zoomin.TV. Zoomin.TV requests and  
 21 acquires permission from original owners of user-generated short form videos that  
 22 Zoomin.TV publishes on its own website. (Riemens Decl. ¶ 10). Zoomin.TV takes  
 23 down and removes video content that is not permitted by the original content  
 24 owners. (Riemens Decl. ¶ 10). Three of the thirty-four alleged infringing videos  
 25 were never produced and/or published on Zoomin.TV’s website and were never in  
 26 Zoomin.TV’s possession. (Riemens Decl. ¶ 11). At the time that Zoomin.TV  
 27 published any of the other thirty-one alleged infringing videos on its website,  
 28

1 Zoomin.TV had no way of knowing and did not know that Jukin Media, Inc.  
2 purportedly submitted U.S. copyright registrations for the alleged infringing video  
3 content on or around the same date. (Riemens Decl. ¶ 12). Until Zoomin.TV  
4 discovered it was a party to the instant lawsuit, Zoomin.TV has never received  
5 notice of an alleged infringement, or even a takedown notice for any of the alleged  
6 infringing videos of which Jukin Media, Inc. claims it has rights. (Riemens Decl. ¶  
7 10). All but five of the alleged infringing videos are in foreign languages.  
8 (Riemens Decl. ¶ 13). The five alleged infringing videos that are for English  
9 speakers were targeted for English speaking countries in Europe. (Riemens Decl. ¶  
10 13). Zoomin.TV has never used its videos to target anyone in the United States.  
11 (Riemens Decl. ¶ 13). The alleged infringing videos were directed to a European  
12 audience. (Riemens Decl. ¶ 13).

13       Second, Jukin cannot demonstrate that any of Zoomin.TV's activities were  
14 expressly aimed at California. The Ninth Circuit has "struggled with the question  
15 of whether tortious conduct on a nationally accessible website is expressly aimed at  
16 any, or all, of the forums in which the website can be viewed." *Mavrix Photo, Inc.*  
17 *v. Brand Tech., Inc.*, 647 F.3d 1218, 1229 (9th Cir. 2012). One rule, however, is  
18 clear: "A defendant has not purposefully availed himself of the privilege of  
19 conducting activities in a forum state merely because he operates a website which  
20 can be accessed there." *American Auto. Ass'n, Inc. v. Darba Enter., Inc.*, 2009 WL  
21 1066506 \*4 (N.D.Cal. April 21, 2009); *see also Mavrix Photo, Inc.*, 647 F.3d at  
22 1229 (stating that "maintenance of a passive website alone cannot satisfy the  
23 express aiming prong"). On the other hand, "operating even a passive website in  
24 conjunction with something more"—conduct directly targeting the forum—is  
25 sufficient." *Id.* (internal citations omitted). "In determining whether a nonresident  
26 defendant has done something more,' [the Ninth Circuit has] considered several  
27 factors, including the interactivity of the defendant's website, the geographic scope  
28

1 of the defendant's commercial ambitions, and whether the defendant ‘individually  
2 targeted’ a plaintiff known to be a forum resident.” *Id.* (internal citations omitted).

3 Here, Zoomin.TV does not “post” or publish videos on any website other  
4 than its own Zoomin.TV website based in the Netherlands, located at  
5 (<http://zoomin.tv/>), which is not an active consumer website. (Riemens Decl. ¶ 9).  
6 Zoomin.TV’s website is not direct to any California residents or U.S. residents in  
7 general. It is directed to European residents. (Riemens Decl. ¶ 4). Despite the fact  
8 that Zoomin.TV’s website can be accessed by users all over the world, Jukin cannot  
9 meet its burden of proving that it is anything more than a passive website because it  
10 is not interactive and does not target the forum state. See *be2 LLC v. Ivanov*, 642  
11 F.3d 555, 559 (7th Cir. 2011) (“If the defendant merely operates a website, even a  
12 highly interactive website, that is accessible from, but does not target, the forum  
13 state, then the defendant may not be haled into court in that state without offending  
14 the Constitution.”).

15 Zoomin.TV does not sell any products or provide services in California.  
16 (Riemens Decl. ¶¶ 6, 14). Zoomin.TV’s contacts with the United States are limited  
17 to supporting its MCN services which consist of making partnership deals with  
18 European subsidiaries and affiliates of U.S. based companies, such as AOL,  
19 YouTube and Yahoo. (Riemens Decl. ¶¶ 14, 17). Zoomin.TV offers these  
20 companies the use of short form videos from its web gallery. (Riemens Decl. ¶¶ 14,  
21 17). All contracts with any of these European affiliates and contacts are European  
22 contracts, subject to the laws of the European countries that these companies target.  
23 (Riemens Decl. ¶¶ 14, 17). Zoomin.TV has no control over these companies’ uses  
24 of the videos obtained from Zoomin.TV subject to the European partnership deals.  
25 (Riemens Decl. ¶¶ 14, 17).

26 Third, none of the alleged harm in Jukin’s complaint is the result of any act  
27 of Zoomin.TV. Zoomin.TV published alleged videos prior to the time that Jukin  
28



1 first submitted U.S. copyright registrations for the same videos. (Riemens Decl. ¶  
 2 12). None of Zoomin.TV's videos were directed to a U.S. audience as evidenced  
 3 by the fact that twenty-nine of the thirty-four alleged infringing videos were never  
 4 released by Zoomin.TV to third party company publishers with a U.S. corporate  
 5 presence and most were in a foreign language. (Riemens Decl. ¶ 13). Five of the  
 6 alleged videos that contain usage of the English language were meant for English  
 7 speaking European countries. (Riemens Decl. ¶ 13). It is unclear how  
 8 Zoomin.TV's website, operating abroad, directed at users abroad, could be said to  
 9 be causing any "harm" in California. Because mere injury to a forum resident alone  
 10 is not a sufficient connection to the forum, and Jukin cannot demonstrate that  
 11 Zoomin.TV's website or any other contacts with California or U.S. residents was  
 12 expressly aimed for purposes of personal jurisdiction, Plaintiff will fail to meet the  
 13 sufficiency of this requirement. *Walden v. Fiore*, 134 S. Ct. 1115, 1125 (2014)  
 14 ("[M]ere injury to a forum resident is not a sufficient connection to the forum;  
 15 courts analyzing personal jurisdiction must engage in a "forum-focused" inquiry.")  
 16 While the location of U.S. based companies, like AOL or YouTube may be relevant  
 17 for lawsuits directly involving the companies, that the headquarters of company is  
 18 located in California, does not establish that Defendant expressly aimed infringing  
 19 activities at the California market. See *DFSB Kollektive Co. v. Bourne*, 897 F.  
 20 Supp. 2d 871, 883 (N.D. Cal. 2012).

21 Jukin has failed to establish any element of the "effects" test. As a result,  
 22 Jukin cannot establish that this Court has specific personal jurisdiction over  
 23 Zoomin.TV.

## 24 2. Plaintiff Cannot Make its Showing Under the Second Prong

25 The Ninth Circuit has adopted a "but for" test to guide analysis under the  
 26 second prong of the test for specific personal jurisdiction. See, e.g., *Ballard v.*  
 27 *Savage*, 65 F.3d 1495, 1500 (9th Cir. 1995). This test requires a court to ask "but  
 28

1 for [defendant's] contacts with the United States and California, would [plaintiff's]  
2 claims against the [defendant] have arisen?" *Id.*

3 Here, Zoomin.TV's contacts with the United States are limited to supporting  
4 its MCN services which consist of making partnership deals with European  
5 subsidiaries and European affiliates of U.S. based companies, such as AOL,  
6 YouTube and Yahoo. (Riemens Decl. ¶¶14, 17). Zoomin.TV offers these  
7 companies the use of short form videos from its web gallery. (Riemens Decl. ¶¶14,  
8 17). All contracts with any of these European affiliates and contacts are European  
9 contracts, subject to the laws of the European countries that these companies target.  
10 Zoomin.TV has no control over these companies' uses of the videos obtained from  
11 Zoomin.TV subject to the European partnership deals. (Riemens Decl. ¶¶14, 17).  
12 Zoomin.TV's partnerships with any U.S. based company is not for the purpose of  
13 targeting any market or user in the U.S. (Riemens Decl. ¶¶14, 17). Even if  
14 Zoomin.TV had not made such contacts, the claims in the complaint would remain  
15 the same—Jukin would still register for U.S. copyrights to short form video content  
16 that Zoomin.TV would have already sought permission for use and published on its  
17 website.

18 **C. The Exercise of this Court's Jurisdiction over Defendant Would**  
19 **Not Be Reasonable**

20 Both general personal jurisdiction and specific personal jurisdiction require  
21 that the assertion of a court's authority over the defendant be reasonable. *See, e.g.*  
22 *Burger King*, 471 U.S. at 474 (for general personal jurisdiction, "defendant's  
23 conduct and connection with the forum State are such that he should reasonably  
24 anticipate being haled into court there.") (citing *World-Wide Volkswagen Corp. v.*  
25 *Woodsen*, 444 U.S. 286, 295(1980)); *Schwarzenegger*, 374 F.3d 802 (for specific  
26 personal jurisdiction, "the exercise of jurisdiction must comport with fair play and  
27 substantial justice, i.e., it must be reasonable.")  
28



1 In evaluating reasonableness, courts must consider seven factors:

2 (1) the extent of the defendants' purposeful interjection  
3 into the forum state's affairs; (2) the burden on the  
4 defendants of defending in the forum; (3) the extent of  
5 conflict with the sovereignty of the defendants' state; (4)  
6 the forum state's interest in adjudicating the dispute; (5)  
7 the most efficient judicial resolution of the controversy;  
8 (6) the importance of the forum to the plaintiffs' interest  
9 in convenient and effective relief; and (7) the existence of  
10 an alternative forum.

11 *Fiore v. Walden*, 688 F.3d 558, 582–83 (9th Cir. 2012). A court should weigh all  
12 seven factors, as no single factor is dispositive.

13 Although all of the factors weigh against the exercise of personal jurisdiction,  
14 or at best for Jukin, are neutral, the first three factors weigh particularly heavily  
15 against the exercise of personal jurisdiction over Zoomin.TV. As demonstrated  
16 previously, Zoomin.TV has not purposefully injected itself into California  
17 specifically or the United States in general. (Riemens Decl. ¶¶ 2-17). Moreover,  
18 litigating this action in the United States would pose a great burden to Zoomin.TV,  
19 as the majority, if not all of the individuals who have information or knowledge  
20 related to the allegations of the complaint reside in the Netherlands and who either  
21 do not speak English or do not speak English as a first language. (Riemens Decl. ¶  
22 17). Additionally, as a Dutch company subject to Dutch law, should this Court  
23 enter injunctive relief, Zoomin.TV may find itself facing an impossible choice of  
24 complying with its obligations under Dutch law, or complying with an inconsistent  
25 United States-issued injunction. (Riemens Decl. ¶ 17).

26 Other factors also weigh against the reasonableness of litigation in this  
27 forum. For instance, under the seventh factor, there is an alternative forum for  
28 Jukin: Dutch courts. The Netherlands have long provided international protections  
for copyrights—for example, the Netherlands has been a signatory to the Berne  
Convention for the Protection of Literary and Artistic Works since October 9, 1912.  
See Ro Decl. ¶¶ 5,6 , Ex. B & C (“WIPO-Administered Treaties: Contracting

Parties > Berne Convention” & “Berne Notification No. 60: Berne Convention for the Protection of Literary and Artistic Words—Ratification by the Kingdom of the Netherlands of the Paris Act (1971) (with the exception of Articles 1 to 21 and the Appendix”). Similarly, the Netherlands is a member of the World Trade Organization and provides intellectual property protection, including copyright protection, pursuant to that organization’s TRIP Agreement. Ro Decl. ¶ 7. The availability of Dutch courts as an alternative forum is further enhanced by the ease of enforcement of any judgment against Zoomin.TV—as a Dutch company with its principal place of business in the Hague, Zoomin.TV is subject to Dutch law, and Dutch judgments are easy to enforce against it. However, there is no treaty between the Netherlands and the United States that would provide for the enforcements of a judgment of this Court by a Dutch court.

It is unreasonable to allow Jukin to force a foreign company that has never done business in California and who has minimal business contacts with the United States as a whole, to defend this case in this forum. The Court should recognize this fact and decline to exercise personal jurisdiction over Zoomin.TV.

#### **IV. DEFENDANT HAS NOT BEEN SERVED**

Federal Rule of Civil Procedure 12(b)(5) authorizes a defendant to move to dismiss the complaint for insufficient service of process. Fed.R.Civ.P. 12(b)(5). Once a party challenges service, the plaintiff bears the burden to show that service was valid under Rule 4. *Brockmeyer v. May*, 383 F.3d 798, 801 (9th Cir.2004).

Federal Rule of Civil Procedure 4 provides three ways to effectuate service on a foreign corporation, partnership or other unincorporated association. Fed.R.Civ.P. 4. Service can be effective pursuant to “(1) the law of the state where the district court is located or of the state where service is effected, see Fed.R.Civ.P. 4(e)(1); (2) by delivering a copy of the summons and complaint in a judicial district of the United States to ‘an officer, a managing or general agent, or to any other

1 agent authorized by appointment or by the law to receive service of process[.]’  
 2 Fed.R.Civ.P. 4(h)(1); or (3) an internationally agreed method for effective service  
 3 such as the Hague Convention. *See id.* at 4(f)(1).” *SVC–Napa, L.P. v. Strategy*  
 4 *Resort Fin ., Inc.*, 2006 WL 2374718, \*1 (N.D.Cal. Aug.16, 2006).

5 Jukin did not serve Zoomin.TV, a Dutch corporation that is not registered to  
 6 do business in California. Jukin did not serve a general manager of Zoomin.TV so  
 7 authorized to receive service of process. Jukin left a copy of summons and  
 8 complaint with a general receptionist of a general office building in Los Angeles,  
 9 California, where a free lance consultant working with Zoomin.TV leases office  
 10 space. (Decl. of Matt Slan (“Slan Decl.”) ¶ 5.) The consultant’s services were  
 11 procured on a performance basis pursuant to a nine month contract with  
 12 Zoomin.TV for the limited and specific role of researching and advising  
 13 Zoomin.TV on the analytics of potential market opportunities and applicability of  
 14 Zoomin.TV’s MCN services in North America. (Slan Decl. ¶ 3). The receptionist,  
 15 shared among other tenants also located in the building called the freelance  
 16 consultant to inform him that there was a bundle of papers for Zoomin.TV at the  
 17 reception desk. (Slan Decl. ¶ 5). The consultant discovered that the contents of  
 18 the papers were a summons and complaint relating to Zoomin.TV. (Slan Decl. ¶ 5).  
 19 The consultant notified Zoomin.TV by emailing a copy of the papers and mailing  
 20 the papers to Zoomin.TV in the Netherlands. (Slan Decl. ¶ 6).

21 Additionally, Jukin did not comply with the Hague Convention, to which the  
 22 Netherlands is a party, or any other standard for international service. Because  
 23 service was not properly effected, it should be quashed.

24 **V. PLAINTIFF’S UNFAIR COMPETITION CLAIM MUST BE**  
 25 **DISMISSED**

26 Jukin’s state law unfair competition claim must be dismissed because it is  
 27 preempted by U.S. copyright law.  
 28

1 The Copyright Act protects the right to reproduce, distribute, and display  
 2 copyrighted materials, as well as the right to prepare derivative works based on the  
 3 copyrighted material. 17 U.S.C. § 106. The Act preempts state law with regard to  
 4 “all legal or equitable rights that are equivalent to any of the exclusive rights within  
 5 the general scope of copyright as specified by section 106....” 17 U.S.C. § 301(a).  
 6 State law claims are preempted when (1) the work at issue comes within the subject  
 7 matter of copyright, and (2) the state law rights are equivalent to the exclusive  
 8 rights of copyright. *Grosso v. Miramax Film Corp.*, 383 F.3d 965, 968 (9th  
 9 Cir.2004). To survive preemption, the state law claim must include an “extra  
 10 element” that makes the right asserted qualitatively different from those protected  
 11 by the copyright act. *Altera Corp. v. Clear Logic, Inc.*, 424 F.3d 1079, 1089 (9th  
 12 Cir.2005) (citing *Summit Mach. Tool Mfg. v. Victor CNC Sys.*, 7 F.3d 1434, 1439–  
 13 40 (9th Cir.1993)).

14 Unfair competition law in California prohibits any “unlawful, unfair or  
 15 fraudulent business practice.” *Barquis v. Merchants Collection Assn.*, 7 Cal.3d 94,  
 16 101 Cal.Rptr. 745, 496 P.2d 817 (1972); *see* 11 Witkin, § 95 at 774–81 (1990).

17 **A. Plaintiff’s state law rights are equivalent to the exclusive rights of**  
 18 **copyright**

19 Because Jukin’s unfair competition claim is based solely on rights equivalent  
 20 to those protected by federal copyright laws, the first prong of the preemption test is  
 21 met. Jukin’s complaint expressly bases its unfair competition claim on rights  
 22 granted by the Copyright Act. Jukin’s unfair competition claim incorporates by  
 23 reference paragraphs from the copyright infringement claim. Compl. ¶ 139.  
 24 Jukin’s complaint alleges that Zoomin.TV “has engaged in unfair competition by  
 25 intentionally tracking Jukin’s video posting behaviors and copying its videos  
 26 shortly after they are published, at the time when they are most likely to be  
 27 monetized, and with the same or similar target audience as Jukin with the intent to  
 28

1 directly affect Jukin's business and siphon viewers to Defendant's digital  
 2 properties." Compl. ¶ 141. The only other paragraph of consequence under Jukin's  
 3 unfair competition claim alleges that "Defendant has engaged in unfair competition  
 4 by utilizing unfair, deceptive, and fraudulent business practices in its direction of or  
 5 acquiescence to routinely posting infringing content on the Internet and potentially  
 6 other means of Defendant's digital distribution." Compl. ¶ 140.

7 **B. The Subject Work Falls Within the Subject Matter of the Copyright**  
 8 **Act**

9 Jukin seeks to protect video postings on its website. These alleged video  
 10 postings are "audiovisual works" that can be copyrighted. 17 U.S.C. § 102(a)(5).  
 11 Thus, the subject works that Jukin seeks to protect are clearly works that fall within  
 12 the "subject matter" of the Copyright Act.

13 Jukin fails to clearly allege how its state law unfair competition claim is  
 14 "qualitatively different from [its] copyright . . . claim," as required for the unfair  
 15 competition claim to survive a copyright infringement challenge. *See Summit*  
 16 *Mach. Tools Mfg. v. Victor CNC Sys., Inc.*, 7 F.3d 1434, 1429 (9th Cir. 1993).  
 17 Because Plaintiff fails to demonstrate both prongs of the preemption, Plaintiff's  
 18 state law claim for unfair competition is preempted. *See* 1 Nimmer, § 1.01[B][1][e]  
 19 at 1–24, n. 110 (stating that if B is selling B's products and representing to the  
 20 public that they are B's products, a claim by A that B's products replicate A's is a  
 21 disguised copyright infringement claim and is preempted); *see also Xerox Corp. v.*  
 22 *Apple Computer, Inc.*, 734 F.Supp. 1542, 1550–51 (N.D.Cal.1990).

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1           Because Jukin expressly relies on its copyright infringement allegations as  
2 the foundation to support its state-law claim, Jukin's unfair competition claim must  
3 be dismissed with prejudice.

4       **VI. CONCLUSION**

5           For the foregoing reasons, Zoomin.TV respectfully requests that this Court  
6 dismiss Jukin's suit in its entirety and with prejudice and quash service.  
7

8       DATED: November 16, 2015

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